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Supreme Court, U.S.
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No. 99-188

In The

Supreme Court of the United States

ERICH H. ADAMS, et al.,

Petitioners,

v.

DELTA AIR LINES, INC. and
AIR LINE PILOTS ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

ARGUMENT

Delta Ignores the Question Presented for the Court's Consideration

Presumably displeased with Petitioners' framing of the Question Presented for Review in their petition, Delta posits a different inquiry – one which bears no relation to the Second Circuit's disposition of this case. Petitioners respectfully submit that their Question Presented is the proper one, as it squarely addresses the conflict the Second Circuit's opinion herein creates with other federal Circuit Courts of Appeals. For this reason, Delta's attempt to change the focus of this petition (and thereby poison the well against Petitioners), should be disregarded.

As evident from the opinion itself, the Second Circuit's decision in this case was simple and straightforward:

> Because we agree with the district court that plaintiffs failed to offer proof from which a reasonable fact finder could infer that defendant had a discriminatory motive in implementing its integration methodology, . . . we affirm the grant of summary judgment.

Adams v. Delta, 175 F.3d 1007 (2d Cir. 1999) (unpublished opinion); Appendix to Petition ("App."), 4.[1] The Second

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[1] Curiously, Delta repeatedly refers to the Second Circuit's opinion as "unpublished," Brief in Opposition, pp. 2, 11, 25, apparently seeking to downplay its significance. While the opinion may not have been published, it is no less binding or

Circuit's opinion begs the question: what ("inadequate") proof did Petitioners provide? As discussed hereafter, Petitioners offered overwhelming proof – deemed credible by the district court – that the primary decision-maker in the adverse employment action at issue in this case harbored impermissible age-based bias. The Second Circuit found this proof insufficient to avoid summary judgment. Thus, the question presented in the petition cogently and squarely captures the relevant issues in this case, and does not – unlike Delta's proffered question – deviate from the explicit holding of the Second Circuit, nor raise issues collateral to the Second Circuit's treatment of this appeal.

Delta Completely Disregards the District Court's Findings

Not content with merely ignoring the actual holding of the Second Circuit, Delta spends the bulk of its Brief in Opposition re-arguing the relevant findings made by the district court regarding Captain Alger and his alteration of the Supplemental CBA. In so doing, Delta comes to the extraordinary conclusions that Petitioners offered no "direct evidence" of discrimination by Alger in this case, and that the Supplemental CBA (and the integration methodology therein) was not altered by anyone at Delta, including Alger. Delta's positions on these respective

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final on the parties, and it cannot be disputed that the Second Circuit's opinion herein has dire consequences for Petitioners – especially because it was wrongly decided.

issues cannot withstand scrutiny, especially when the district court's opinion is considered.

Direct Evidence of Alger's Age-Based Bias

In its brief, Delta posits that Petitioners have not (and presumably cannot) come forth with any direct evidence of discrimination because Captain Alger is not age-biased. Brief in Opposition, pp. 23-24. The district court found to the contrary, however, as outlined in the petition, p. 16; App. 14-16.

> Plaintiff's argument that the integration methodology was motivated by discriminatory motive focuses on the derogatory comments contained in Capt. Alger's notes and deposition transcript and Delta's alleged history of age discrimination. Such comments certainly reflect a bias toward older pilots, and the deposition testimony in particular evinces a bias based on the sorts of age-based stereotypes that the ADEA was meant to combat.

(App. 14).[2]

The district court went on to refer to Alger as "he of impermissible age-based bias." (*Id.*).

Notwithstanding the district court's explicit findings to the contrary, *supra*, Delta again seeks to assert that

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[2] In light of this finding by the district court, Delta's citation to *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), and the discussion therein regarding the "inaccurate and stigmatizing stereotypes" which run counter to the ADEA's principles, (Brief in Opposition, p. 12), is particularly interesting.

Alger's notes – which contain the relevant derogatory age-based comments – were not statements by Alger, but were merely notations reflecting statements by Captain Affourtit at Pan Am. Brief in Opposition, pp. 23-24, note 11. This claim was previously exposed as unworthy of belief by Affourtit, as referenced in the petition, p. 8, notes 7 and 8. Nonetheless, to the extent that there is a **genuine** factual dispute about the "author" of the statements reflected in those notes, all reasonable inferences must be drawn in favor of Petitioners' view of this evidence, as this is a summary judgment case. Consequently, the derogatory comments were the words of Alger.

The above record citations leave no doubt that Petitioners produced evidence that Alger harbored discriminatory attitudes toward older cockpit personnel, and that the district court found this evidence credible. This, therefore, is the factual posture in which the Second Circuit reviewed this case – with credible direct evidence that Delta (Alger) had impermissible age-based animus.

Proof That the Integration Methodology Was Altered By Delta

Incredibly, despite all that has transpired and been decided previously in this case, Delta now asserts that there was nothing surprising or problematic about the methodology with which it integrated the Pan Am personnel, including Petitioners. This is patently false.

Perhaps trading on the Court's lack of familiarity with the underlying facts in this case, Delta disclaims any wrong-doing here by informing that it integrated Pan Am pilots by using their seniority list, and the Pan Am flight

engineers (Second Officers) using their seniority list – implying that this was completely appropriate in this case. Brief in Opposition, pp. 1-2, 8-9, 13-14. The problem with the integration methodology employed by Delta, however, is that **it was contrary to the integration methodology provided for in all prior drafts of the agreement between the parties**. As found by the district court, this unilateral change was also made without the required notice:

> In initial drafts of the Supplemental CBA, which were shown to the Pan Am pilots pursuant to the APA, Pan Am First and Second Officers were to be ranked against each other, **collectively**, and then integrated into the Delta list behind Pan Am Captains. *See* Draft Supplemental CBA § 20(F)(2). Moreover, the initial drafts provided that if Pan Am failed to provide **a list** of First and Second Officers by seniority rank, then the pilots' birth-date would be used to establish rank among them. *See id.* § 20(F)(3).
>
> The final version of the Supplemental CBA, however, did not contain the birth-date fall-back provision, and provided that Second Officers (i.e., Flight Engineers) be ranked according to the Pan Am Flight Engineers' union (FEIA) seniority list – i.e., Second Officers were to be ranked separate from First Officers. Plaintiffs allege (and defendant does not dispute) that, in violation of the APA, **this last minute change to the Supplemental CBA** was never shown to Pan Am pilots prior to its execution on August 30, 1991.

* * *

> Plaintiffs also make much of the **last-minute change to the Supplemental CBA** that resulted in Flight Engineers being integrated according to the separate FEIA list provided by Pan Am, as opposed to being ranked by birth-date **with** First Officers.

(App. 8-9, 15) (emphasis supplied).

The above quoted material lays waste to Delta's continuing mantra that it acted appropriately in employing the two-list integration methodology. The indisputable facts here are that the parties agreed that Pan Am would attempt to provide Delta with a unified seniority list which merged the existing First and Second Officer seniority lists. Barring success in so doing, the parties agreed that the unified list would be created using the dates-of-birth (rather than seniority) of both the First and Second Officers. Draft Supplemental CBA §§ 20(F)(2) and (F)(3). Despite these prior understandings between the parties, Delta thereafter unilaterally changed the integration methodology to one which (improperly) had catastrophic consequences for Petitioners. This Court, like the district court, should disregard Delta's claim that it integrated Petitioners in an appropriate (non-controversial) manner.

Proof That It Was Alger Who Unilaterally Altered the Integration Methodology

Delta next posits that direct evidence is lacking because Alger "neither had the right nor the ability to impose any seniority integration methodology" here. Brief in Opposition, pp. 16, 23-24. Delta is wrong again,

as shown in the district court's opinion. Simply put, the district court found, for the purposes of summary judgment, that Alger had unilaterally altered the Supplemental CBA, thereby instituting the integration methodology complained of by Petitioners.

> Plaintiffs also allege that [Alger] advised Pan Am personnel of this methodology three days before the supplemental CBA was executed. Plaintiff's believe this fact, as well as other evidence described below, supports their contention that Capt. Alger unilaterally changed the ranking system. . . . [T]he Court must, on this motion for summary judgment, draw all inferences in favor of plaintiffs.
>
> * * *
>
> This evidence, plaintiffs contend, raises an inference that Captain Alger – he of impermissible age-based bias – was responsible for the change in the Supplemental CBA. Up to this point all is well and good for plaintiffs.

(App. 9, and note 4; 15).

Try as it might, Delta cannot get around this evidence. Moreover, this evidence of Alger's role in the adverse employment action, combined with the proof of his impermissible age-based bias, unquestionably rises to the level of "direct evidence" from which a fact-finder could find that discrimination played at least a motivating role in the decision to change the integration methodology. *Terbovitz v. Fiscal Court of Adair County Kentucky*, 825 F.2d 111, 115 (6th Cir. 1987); *Starceski v. Westinghouse Electric Corp.*, 54 F.3d 1089, 1097 (3rd Cir. 1995); *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir. 1997); *Burns v. Gadsen State Community College*, 908 F.2d 1512, 1518 (11th Cir.

1990). This is precisely why the Second Circuit's dismissive treatment of this direct evidence cannot stand, and the petition should be granted.

Delta Fails to Address the Clear Conflict Created by the Second Circuit's Ruling

Based on nothing more than circular reasoning, Delta completely avoids any discussion about the inter-circuit conflict which gives rise to the present petition. Brief in Opposition, pp. 25-26. Delta apparently believes that because the Second Circuit did not specifically spell out its rejection of Petitioners' direct evidence of discrimination, there can be no conflict with cases from the Third, Sixth, Seventh and Eleventh Circuits holding that such evidence necessarily precludes summary judgment. As demonstrated above, however, the Second Circuit unquestionably rejected Petitioners' direct evidence in making its ruling, as this is the only conclusion that can be drawn from the determination that Petitioners' evidence – which included the direct evidence relating to Alger – was insufficient to avoid summary judgment. Thus, the conflict discussed in the petition, pp. 13-17, is manifest.

Petitioners Did Not "Waive" Their Right to a *Price Waterhouse* Consideration

Finally, Delta's assertion that Petitioners somehow "waived" their right to a *Price Waterhouse* analysis, Brief in Opposition, pp. 21-22, is simply wrong. In the *Price Waterhouse* opinion itself, this Court put the onus on the

district court to determine whether an employment discrimination plaintiff can prove his or her case under either a *Price Waterhouse* analysis or a *McDonnell Douglas* analysis:

> Nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a "pretext" case or a "mixed-motives" case from the beginning in the district court[.] . . . At some point in the proceedings, of course, **the District Court must decide** whether a particular case involves mixed motives.

Price Waterhouse, 490 U.S. 228, 246 (Brennan, J.) (emphasis supplied).

* * *

> Once all the evidence has been received, **the court should determine** whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it. If the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonnell Douglas* and *Burdine*.

Price Waterhouse, 490 U.S. 228, 278 (O'Conner, J.) (emphasis supplied).[3]

Thus plaintiffs, like Petitioners here, are under no duty to "opt into" one particular framework, as Delta

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[3] *Accord Radabaugh v. Zip Feed Mills*, 997 F.2d 444, 448 (8th Cir. 1993) ("Whether a case is a pretext case or a mixed-motives case is a question for the court once all the evidence has been received."); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1098 (3d Cir. 1995) (same).

seems to argue, and the above quoted material supports Petitioners' claim before the Second Circuit that the district court erred in failing to properly apply the Court's mandate in this regard.[4] Perhaps this explains Delta's failure to cite to any case applying such a "waiver" concept in cases like the present one.

CONCLUSION

Based on the arguments and authorities set forth above and in the petition, Petitioners respectfully request that the Court accept certiorari jurisdiction in this case pursuant to Rule 10(a) of the Rules of the Supreme Court of the United States.

Respectfully submitted,

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[4] Notably, the Second Circuit did not find that Petitioners waived their right to a *Price Waterhouse* analysis.